IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

CRL.A.No. 668 of 2000(A)

(Against Judgment dtd. 1.6.2000 in Crl.Appeal No.5/99 of the Additional Sessions Court, North Paravur)

APPELLANT/RESPONDENT/COMPLAINANT:

G.GOPAN, S/O.LATE GOPINATHAN KARTHA,
KALABHAN, CHELAMATTOM, OKKAL.P.O.,
(VIA) PERUMBAVOOR.

BY ADV. SRI.B.RAMACHANDRAN

RESPONDENTS/APPELLANT AND STATE/ACCUSED:

1. TONNY VARGHESE,
S/O.VARGHESE,
PADAYATTIL HOUSE, KIDANGOOR.P.O.,
(VIA) VENGOOR, ANGAMALY.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.GEORGE ABRAHAM
BY PUBLIC PROSECUTOR SRI.C.M.KAMMAPPU.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/10/2007, THE COURT ON 12/11/2007 DELIVERED THE FOLLOWING:

V.K.MOHANAN, J. **(C.R)**

Crl..A.No. 668 of 2000

Dated this the 12th day of November, 2007

J U D G M E N T

The appellant herein is the complainant in C.C.No.297 of 1996 on the files of the Judicial First Class Magistrate Court-II, Aluva which is a case instituted upon a private complaint for an offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to for short as 'the N.I.Act' only). As per the judgment dated 19.9.1998 in C.C.No.297 of 1996 of the trial court, the accused was found guilty under Section 138 of the N.I.Act and he was sentenced to undergo simple imprisonment for six months. Challenging the above conviction and sentence, the accused preferred an appeal as Crl.Appeal No.5 of 1999 (originally it was numbered as Crl.A.No.387/98 of the Sessions Court, Ernakulam). As per the judgment dated 1.6.2000 in Crl.Appeal No.5 of 1999, the Additional Sessions Judge, North Paravur allowed the appeal setting aside the conviction and sentence of the trial court. Challenging the above order of

the lower Appellate Court, the complainant initially filed Crl.M.C.No.4122 of 2000 for leave of this Court which was granted on 11.8.2000 and thus, this appeal is preferred against the judgment of the lower Appellate Court.

2. The case of the appellant/complainant is that the accused borrowed a sum of Rs.2 lakhs from the complainant promising to repay the same amount on demand for which Ext.P1 cheque dated 10.11.1995 was issued. The cheque was drawn from the account maintained by the accused in the Angamaly Branch of Federal Bank Limited. On presentation of the cheque for encashment, the same was returned on 12.12.1995 for the reason 'funds insufficient'. Consequently, the complainant had caused to send a lawyer notice on 22.12.1995 which was received by the accused. Then the accused sent a reply denying the transaction and according to the complainant, it was only false allegation and contention. Thus, according to the complainant, though a statutory notice was issued, no payment was

effected within the statutory period and hence the accused has committed the offence punishable under Section 138 of the N.I.Act. Therefore, he approached the trial court by filing complaint under Section 138 of the N.I.Act.

3. During trial, Pws.1 to 3 were examined as prosecution witnesses and Exts.P1 to P7 were marked as documentary evidence on the side of the complainant. On the side of defence, Dws.1 and 2 were examined and Exts. D1 and D2 were marked as documentary evidence. After appreciation of the evidence and materials on records, the trial court was of the opinion that Ext.P1 cheque was issued in discharge of the debt, but the same was returned for want of sufficient fund and the complainant had complied with all legal formalities and therefore, it was found that the accused is guilty of the offence under Section 138 of the N.I.Act.

4. On appeal, at the instance of the accused, the lower Appellate Court had found that the complainant had miserably failed to prove the passing of

consideration and merely because of the admission of signature in the cheque, it could not be said that the execution of cheque was proved. Relying upon certain decisions, the lower Appellate Court had held that though the accused had admitted his signature in the cheque, in all other respect it was a blank cheque, and what was admitted was the signature alone and thus, that would amount to denial of execution of cheque. In support of the above conclusion, the lower Appellate Court had relied upon certain materials which are available on record. On analysis and application of Section 118(a) of the N.I.Act, in the facts and circumstances of the case, the lower Appellate Court had come to a conclusion that the appellant/complanant had failed to discharge the initial burden regarding the execution of the cheque and therefore, the presumption under Section 118(a) of the N.I.Act was not available to him. Further, on an appreciation of the evidence and on the basis of materials on record, the lower Appellate Court had held that since the very execution of the

cheque was denied by the accused, the complainant could not seek the aid of presumption available under Section 139 of the N.I.Act. It was also found by the court below that the complainant/appellant would not come within the meaning of 'holder' of promissory note, bill of exchange or cheque as two conditions mentioned in Section 8 of the N.I.Act had not been satisfied conjunctively. The lower Appellate Court had specifically found that there was no evidence that the said cheque was issued for payment of any amount to the complainant in discharge of any debt or liability. Therefore, it was found that Ext.P1 cannot be termed as a cheque of the nature referred to under Section 138 of the N.I.Act. Hence, according to the court below, the complainant is not entitled to the presumption available under Section 139 of the N.I.Act. The lower Appellate Court had also found that the dishonour of Ext.P1 cheque for want of sufficient funds in the account on which it was drawn, issuance of notice demanding payment of Ext.P1 cheque, non-payment of the amount

even after receipt of notice by the accused etc. did not assume any importance in the light of the earlier findings of the court. Thus, the lower Appellate Court had specifically found that the complainant had failed to make out a case punishable under Section 138 of the N.I. Act and accordingly, the conviction and sentence imposed against the accused had been set aside. Aggrieved by the above findings, appellant/complainant has filed this appeal.

5. I have heard the learned counsel for the appellant, the learned counsel for the first respondent as also the learned Public Prosecutor.

6. Learned counsel appearing for the appellant strenuously submits that the lower Appellate Court erred in acquitting the accused on the basis of the decisions which were referred to in the judgment since those judgments were pertaining to the period before the amendment brought to the N.I.Act. According to counsel, Chapter XVII is newly introduced, incorporating penal provision and therefore, all the decisions referred

to by the lower court are not useful aS those decisions were prior to the newly introduced chapter mentioned above**.** Going by the memorandum of Appeal also, it appears that the main ground is ground No.(B) which says that the lower Appellate Court went wrong in finding that Ext.P1 cheque is not properly executed and it is further stated that the court came to such conclusion relying on decision prior to the amendment of N.I.Act incorporating penal provisions to punish for issuing cheque without keeping the sufficient funds. All other grounds in the memorandum of appeal are general. The appellant's counsel further submits that the statutory presumption under Section 118(a) and 139 are in favour of the complainant/appellant and those presumptions were not rebutted by the accused by cogent evidence. Hence, it is argued that on the failure of the accused to rebut the presumption, as rightly done by the trial court, the lower Appellate Court ought to have confirmed the conviction and the sentence instead of acquitting him. In support of the above contentions,

the counsel for the appellant placed reliance on various decisions.

7. After an elaborate consideration of the entire materials available on record, the Sessions Court had held that the benefits of presumption available under Section 118(a) and 139 were not available to the complainant, simply for the reason that Ext.P1 cheque contained the signature of the accused, especially when the complainant failed to establish the execution of the cheque and also the passing of consideration. The lower Appellate Court also held that the complainant could not be termed as a holder. Thus the lower Appellate Court came to a conclusion that no offence under Section 138 of the N.I.Act is established against the accused and therefore, the order of conviction and sentence passed by the trial court were set aside and the accused was accordingly acquitted.

8. It is the above order of acquittal challenged in this appeal and it is argued that the above order of acquittal shall be set aside and the order of conviction

and sentence passed by the trial court shall be confirmed.

9. Before going into the above legal question, it would be beneficial to examine the facts involved in the case so as to appreciate the legal question in its correct perspective.

10. The only case put forwarded by the complainant in his complaint is that the accused had borrowed a sum of Rs.2 lakhs from the complainant for his business purpose with a promise that the amount would be repaid on demand by the complainant and thus, the cheque in question was issued, which was dishonoured when presented for encashment for the reason that 'funds insufficient'. Thus according to the complainant, statutory notice was sent, which was also not honoured and no amount was paid within the stipulated time and therefore, he approached the trial court by filing the complaint. During his chief examination, nothing more was stated and he had strictly deposed only in accordance with the versions

contained in the complaint. During the cross-examination, he had made certain improvements and stated that he had acquaintance with the accused for 4 to 5 years through one Viswan at Angamaly and they were in good relations. On further cross-examination, he had deposed that the accused had started a company viz., New India Credit Capitals Investment Private Limited. On a pointed question as to whether the complainant was the Director of the company, he answered positively. The company was started as Manchiyam company. To several questions regarding the company, the complainant had answered that the company is not working at present and it is in a standstill. They have decided to give back the share to the share holders. To the specific question as to whether the company has sufficient asset for repaying the share value to the share holders, the answer was 'not known'. To another question as to whether a motor bike was pledged for Rs.5000/- for the company purpose, he stated, he did not know.

11. The specific case put forwarded by the accused is that he was the Managing Director of the above company and the complainant was one of the Directors. In order to meet the monetary need of the company, they have decided to pledge a motor bike in a financial institution at Perumbavoor for Rs.5000/- and towards the security for the said transaction, the accused had entrusted a blank cheque i.e., Ext.P1 with the complainant, which is referred to in the above complaint. From the above facts, it is crystal clear that both the complainant as well as accused are not strangers or they are not belonging to rival business groups, but they were having much acquaintance with each other and they were together in a company of which the complainant is one of the Directors and the accused was the Managing Director of the same company. The entire transaction alleged in the complaint has to be examined in the above factual back ground. It is pertinent to note that the complainant did not mention any of those facts in the complaint and even

during his chief examination. The case of the complainant is that Ext.P1 cheque, bearing the signature of the accused, was dishonoured when it was presented for encashment and no amount was paid within the statutory period though a formal demand was made and therefore, the accused has committed the offence under Section 138 of the N.I.Act.

12. It is true that when the cheque in question contained the signature of the account holder, it is for the accused to explain the same, but merely because Ext.P1 cheque contained the signature of the account holder or the accused, it cannot be said that the same was executed by him. In this case, it is relevant to note that the accused has specifically denied the execution of the cheque and the case advanced by him is that Ext.P1 cheque was entrusted with the complainant and the cheque contained nothing more than his signature. So, on the basis of the above admission, counsel for the appellant/complainant submits that the complainant is entitled to get the benefit of presumption envisaged by

Sections 118(a) and 139 of the N.I.Act. On the other hand, counsel for the respondent/accused submitted that the presumption regarding consideration can be drawn under Section 118(a) only when the execution is proved and therefore, it is clear that passing of consideration and the existence of debt are not proved by the complainant. No doubt, it is the duty of the complainant to establish all that ingredients of Section 138 of the N.I.Act in order to canvass a conviction against the accused. Section 138 contained in Chapter XVII of the N.I.Act reads thus:-

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be

deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

Explanation.--For the purposes of this section, "debt or other liability" means

a legally enforceable debt or other liability.]

Going by Section 138 of the N.I.Act, it can be seen that 'a drawing of cheque' by a person on an account maintained by him with the banker for payment of any amount of money to another person from out of that account 'for the discharge', in whole or in part, 'of any debt or other liability' are two important ingredients, especially in the background of this case. In the decision reported in **Ch.Birbal Singh** v. **Harphool Khan** (AIR 1976 Allahabad 23), it was held that execution of documents consists of signing of the document written out, read over and understood and does not consist of merely signing of a blank paper. In another decision reported in **Thakurlal** v. **Ramadhar** (1968 ALJ 480), it had been held that mere admission of putting of signature and thumb mark on a blank sheet of paper is not admission of execution of the document. In the present case, the accused did not dispute the signature in Ext.P1 cheque,

but his specific case is that he had entrusted with the complainant Ext.P1 blank cheque which contained his signature. It is brought out through evidence that the complainant does not remember that when Ext.P1 cheque was given to the accused. According to him, the amount and the date shown in the cheque might have been written by any member of the family of the accused or his friend. The complainant is also not aware as in whose handwriting, the cheque was written. Therefore, it is crystal clear that the complainant is not aware of the execution of Ext.P1 cheque. When the execution of the cheque is denied by the accused, it is for the complainant to establish the same. In the absence of any positive evidence regarding the execution of the cheque by the accused, it is to be held that the accused had issued only blank cheque and the same was not executed by him. Simply because the cheque contained the signature of the accused, it cannot be said that the cheque was drawn by the accused as contemplated by Section 138 of the N.I.Act.

13. The contentions of the appellant that the decisions referred to and relied on by the court below are of prior to the amendment to the N.I.Act and hence the court below has committed a wrong, are not legally correct and not acceptable. It is beyond the scope of debate that the mode of execution of an instrument and its legal validity and sanctity including the presumption under Section 118 of the N.I.Act are same, whether it is executed before or after the introduction of the new Chapter, namely Chapter XVII into the N.I.Act.

14. It is also relevant to note that the complainant has miserably failed to prove the passing of any consideration and also any legally enforceable debt or liability.

15. It is pertinent to note that going by the provision namely, Section 138 of the N.I.Act, it can be seen that the legislature has employed certain words cautiously and not without any meaning. The word employed in Section 138 viz., 'drawn', 'discharge of any debt or other liability' are conveying the message of the

legislature, through which we can understand the intention of the legislature. So while interpreting the provisions or the word, the court has to give effect the intention of legislature. At any stretch of imagination, it cannot be said that putting signature on the blank cheque is equivalent to the word 'drawn' used in Section 138 of the N.I.Act. Therefore, the word 'drawn' used in Section 138 has to be understood as 'execution' of cheque. In a decision reported in **Johnson Scaria** v. **State of Kerala** (2006(4) KLT 290), this Court has held "the burden is always on the prosecution to prove the offence against an indictee in all prosecutions and a prosecution u/s. 138 of the N.I.Act is no exception to that general rule. Execution and issue of the cheque have to be proved to draw the presumption under S.139 and S.139 does not shift the burden to prove execution and issue of the cheque." In the same decision, it is further held that "admission of signature in a cheque goes a long way to prove due execution.

Possession of the cheque by the complainant similarly goes a long way to prove issue of the cheque. The burden rests on the complainant to prove execution and issue. But, under S.114 of the Evidence Act , appropriate inferences and presumptions can be drawn in each case on the question of execution and issue of the cheque depending on the evidence available and explanations offered." In the present case, on an appreciation of entire factual situation and the materials on record, it cannot be said that the complainant has discharged his burden in proving the execution of Ext.P1 cheque and therefore, I am fully endorsing the reason given by the lower appellate court for coming to the conclusion that the complainant has failed to prove the execution of Ext.P1 cheque.

16. Another point argued by counsel for the appellant is that he is entitled to get the benefit of presumption envisaged by Section 118 of the N.I.Act. Stressing on the admission at the side of the defence regarding the signature on Ext.P1 cheque, the counsel

argued that under Section 118(a) of the N.I.Act, it is to be presumed that consideration has passed during the transaction and therefore, the reasoning given by the court below is unacceptable and liable to be rejected. In the present case, PW-1 himself was not aware of the actual transaction. He does not know who filled up the blank cheque. He does not know the author of the hand writing appeared in Ext.P1 cheque. He does not know when Ext.P1 cheque was issued. Only in the cross examination, he has stated regarding the payment made by 2,3 instalments. Neither in the complaint nor during chief examination, the complainant has got a case that the consideration was passed by way of instalments. On the basis of the above materials on evidence, we have to examine the execution of the cheque as stated earlier, PW-1 complainant has miserably failed to prove the execution of the cheque itself and therefore, the presumption under Section 118(a) of the N.I.Act regarding the consideration is not available to the appellant/complainant. On the basis of the decision

reported in **General Auto Sales** v. **Vijayalakshmi** (2005(1) KLT 478), the counsel for the appellant argued that even if a blank cheque has been given towards the liability or even as security, when liability is assessed and quantified, if cheque is filled up and presented to Bank, the person who had drawn cheque cannot avoid the criminal liability arising out of Section 138 of the N.I.Act.

17. The facts involved in the above case is entirely different from the present one. In that case, it is relevant to note that there was a settlement between the complainant and the accused and the cheque was drawn for a fixed amount towards the amount due as found in the settlement. Here the transaction itself is denied and the case set up by the accused is that the cheque was given for security for availing loan by pledging a bike of the company. Therefore, the above decision is not helpful for the appellant. Another decision relied on by the counsel for the petitioner is reported in **R.Sivaraman** v. **The State of Kerala and Others**

(2006(3) KLJ 92) wherein this Court has held "the Court has to presume that the cheque had been issued for a debt or liability. It is also held in the very decision that the presumption is rebuttable, the burden of proving that the cheque had not been issued in discharge of a debt or liability is on the accused. In the present case, first of all, the execution of the cheque was not proved and therefore, the presumption under Section 139 is not available in favour of the complainant/appellant. The materials available on records are not sufficient to show the discharge of the initial burden on the complainant/appellant to establish a presumption under Section 139. The burden of rebutting the presumption will be shifted to the accused only when the complainant/appellant has discharged his initial burden. A decision reported in **Johnson Scaria** v. **State of Kerala** (2006(4) KLT 290) is cited by the appellant for canvassing the proposition that law does not mandate proof of original transaction or existence of original consideration and the Courts are not bound to

adjudicate on the liability under the cheque in dispute. It is true that the court is not bound to adjudicate on the liability under the cheque in dispute, but when the court is confronted with the question regarding the penal liability arising under Section 138 of the N.I.Act, especially when the execution of the cheque itself is disputed and not proved, the court has to consider the transaction for arriving at a safe conclusion. In the present case, the execution itself is not proved by the complainant and therefore, the presumption under Section 139 is not available to him. Even if the initial burden is discharged by the complainant, the accused can rebut the presumption either by adducing direct evidence or even by relying on broad improbabilities of the prosecution case including the improbable evidence of the prosecution. Therefore, all the factual circumstances involved in a particular case could have relied on by the accused to discharge his burden. The Apex Court, in a decision reported in **Kamala.S.** v. **Vidhydharan.M.J. and another** [(2007) 5 SCC 264],

has held that presumption under Sections 139 and 118 (a) is rebuttable and further held that burden on accused to rebut the presumption can be discharged by preponderance of probabilities and Court can draw inference from material brought on record as well as circumstances relied upon by the accused. In the present case, going by the materials and evidence on record and particularly the facts involved in the case, I am of the view that the appellant/complainant has miserably failed to establish his case beyond doubt.

18. As I stated earlier, this is an appeal preferred against the order of acquittal of the lower Appellate court. This Court while exercising the appellate jurisdiction cannot merely substitute a view unless there is sufficient reason to improbablise the finding of the lower Appellate Court or any patent illegality. In the facts and circumstances involved in the present case and the materials and findings on record, I have no hesitation to hold that the reasoning assigned by the lower Appellate Court for acquitting the accused

is perfectly legal and valid and I find no reason to interfere with such order of acquittal. In this case, it is relevant to note that the parties were having prior acquaintance and they were part and parcel of one establishment and it cannot be ruled out, the possibilities of vexatious litigation due to personal animosity. I am constrained to draw such a presumption on the fact that though in the complaint, the allegation was for non-payment of Rs.2 lakhs and though the trial court has awarded only imprisonment as a sentence, the appellant/complainant has not chosen to prefer appeal against the insufficiency of sentence, in other words, there was no move from his side for realising the amount by way of fine or compensation by filing an appeal.

In the light of the above facts and circumstances, there is no merit in the appeal and accordingly, the appeal is dismissed.

V.K.MOHANAN,
Judge

Mbs/

V.K.MOHANAN, J.

Crl.A.NO.668 OF 2000

J U D G M E N T

DATED: -11-2007